Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Promotion of Competitive Networks	)	WT Docket No. 99-217
in the Local Telecommunications Markets	)	
	)	
Wireless Communications Association	)	
International, Inc Petition for Rulemaking to	)	
Amend Section 1.4000 of the Commission's	)	
Rules to Preempt Restrictions on Subscriber	)	
Premises Reception or Transmission	)	
Antennas Designed To Provide Fixed	)	
Wireless Services	)	
	)	
Cellular Telecommunications Industry	)	
Association Petition for Rule Making and	)	
Amendment of the Commission's Rules	)	
To Preempt State and Local Imposition of	)	
Discriminatory and/or Excessive Taxes	)	
and Assessments	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications	)	
ACT of 1998	)	

COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

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SUMMARY

In this NPRM, the Commission seeks comment on a number of issues, intended to help insure that competitive providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops and facilities in multiple tenant environments. CBT limits its comments herein to issues involving application of Section 224 of the Telecommunications Act of 1996 (the "Act") to conduit within a privately owned multi-tenant building, to issues concerning Federal regulation of riser cable and the proposed treatment of riser cable as an unbundled element.

In these comments, CBT distinguishes many of the fundamental differences between right-of way and conduit included under Section 224 of the Act and in-building right-of-way and conduit in multi-tenant buildings, differences that should exclude in-building right-of-way and conduit from the coverage of Section 224. In addition, in-building right-of-way and conduit is "owned and controlled" by the building owner not the telecommunications provider. Therefore, it should not be included under Section 224 requirements.

In keeping with the deregulatory nature of the Act, the Commission should not intervene and impose additional burdensome federal regulations on in-building conduit, right-of-way and riser cable. Building owners are not discriminating against new telecommunications providers, but are seeking to raise their revenues through charging for usage of in-building right-of-way and conduit from both ILECs and CLECs alike. The Commission should trust in the competitive telecommunications and real estate

markets to allow the parties, which include tenants, building owners and telecommunication providers, to negotiate acceptable solutions.

Finally, no reasonable application of the “necessary and impair” standards required under 251(d)(2) of the Act could result in a requirement for building and riser cable to be treated as an unbundled network element.

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COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

Cincinnati Bell Telephone Company ("CBT"), an independent mid-size local exchange carrier hereby submits these comments in response to the Commission's July 7, 1999 Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding. The NPRM seeks comment on a number of issues that the Commission wishes to consider to insure that competitive providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops and facilities in multiple tenant environments.

CBT limits its comments to issues involving the application of Section 224 of the Telecommunications Act of 1996 (the "Act")[1] to conduit within a privately owned multi-tenant building, the Federal regulation of riser cable and proposals to consider riser cable as an unbundled element under Section 251 of the Act.

I. Introduction

As a long-standing provider of telecommunications services, CBT currently occupies many conduit or other riser facilities in multi–tenant buildings. Following the Second Report and Order in FCC Docket 88-57,[2] CBT, unless the property owner directed otherwise, implemented a reasonable and non-discriminatory practice in multi-tenant buildings of placing the "demarcation point" at the premise of the tenant rather than adopting a minimum point of entry ("MPOE") policy. For example, absent instructions to the contrary from a property owner, if a tenant occupied only the 10th floor of a multi-tenant building in the normal installation, CBT would run wire from the entrance point (the basement in many installations) in the building to the 10th floor in or adjacent to the space occupied by the tenant. Normally, this wire would occupy conduit or other riser facilities from the point of entry to the tenant location. Most of CBT's installations in multi-tenant buildings have been made in this manner both before and after Docket 88-57.

[1] 47 USC § 224

[2] In the Matter of Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network and Petition for Modification of Section 68.213 of the Commission's Rules filed by the Electronic Industries Association, CC Docket No. 88-57, *Second Report & Order*, 12 FCC Rcd 11897, 11914-15 (1997).

CBT is in a unique position with respect to riser cable in most multi-tenant buildings, in that most ILECs have adopted a MPOE policy for these facilities. It is out of this unique experience that CBT provides these comments to the Commission. First the riser cable, in the case of CBT's installations, remains on the regulated books of the company as part of the local loop under the jurisdiction of the respective state utility commission.

More importantly, however, CBT neither owns nor controls the conduit or other riser facilities provided to extend the riser cable from the point of entry to the demarcation point at the tenant's location. CBT simply makes use of the conduit or other riser facilities by agreement of the building owner. Conduit or other riser facilities remain the property of and under the sole control of the building owner. If arrangements cannot be made with the building owner for use of conduit or other riser facilities, CBT under its reasonable and non-discriminatory policy reverts to the MPOE policy for the installation. Therefore, the ultimate control of the building's conduit and riser facilities rests with the building owner.

II. Section 224 of the Act cannot be read to include building conduits or riser cable in multi-tenant buildings not owned or controlled by the telecommunications provider.

In the NPRM, the Commission states that "so long as a utility uses any pole, duct, conduit or right-of-way for wire communication, we tentatively conclude that all rights-of-way that it owns or controls, whether publicly or privately granted and regardless of the purpose for which a particular right–of-way is used are subject to section 224."[3] The Commission further tentatively concludes "that the obligations of utilities under section

[3] NPRM at ¶ 42.

224 encompass in-building conduit, such as riser conduit, that may be owned or controlled by the utility."[4]

Based on these tentative conclusions, it appears that the Commission is seeking to expand the application of Section 224 far beyond any scope of coverage envisioned by Congress in adopting the Act. By the Commission's own admission, the legislative history of the Act indicates that the intended meaning of "conduit" in this context is "underground reinforced passages," not in-building conduit, such as riser conduit. Moreover, the Commission admits that Section 1.1402 (I) of its own rules defines conduit as consisting of pipe "placed in the ground."[5] Yet, the Commission seeks to ignore these established definitions and interpretations, and adopt a definition of "conduit" that is at variance with both the legislative history and the Commission's own rules. The plain language of the statute does not support such an expansion of the meaning of "conduit" to include in-building conduit.

The Commission's interpretation of the language of the Act is unreasonable, in that the Commission appears to be attempting to reach a result not at all intended by the clear language and legislative history of this section. While the Commission relies upon *Chevron, USA, Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984) for the proposition that the legislative history of the Act does not determine the current question, it is not at all clear that *Chevron* deference is appropriate in this situation. In this case, the Act is neither silent nor ambiguous on the question before the Commission,

[4] NPRM at ¶ 44.

[5] NPRM at ¶ 44.

and therefore the Commission is to follow the language of the Act, guided by the legislative history.[6]

Even in situations where some conduit is present, the communications provider, in this case the incumbent local exchange carrier ("ILEC"), does not own or control the facility. The building owner owns and ultimately controls this form of access. Just as the building owner owns and controls the locks and keys to the building itself, it owns and controls access to the riser facilities and equipment closets or other common areas in the buildings. Historically, ILECs have been allowed usage of these facilities to provide service to the tenants in the building.

While an ILEC or CLEC may have the ultimate right under state laws, at least in Ohio, to exercise the power of eminent domain as to in-building facilities, CBT has not, to date, exercised this right as to in-building facilities. Surely the Commission is not taking the position that telecommunications providers should be required to exercise this right or that because these providers have such a right, they, therefore, own or control the in-building facilities in some fashion.

CBT's use of in-building facilities is normally acquired by the informal agreement and consent of the building owner. Additionally, tenants may have contractual rights with the building owner through their lease arrangements that permit the carrier of their choice to provide service to their location. CBT retains no control over these risers that can be utilized by an alternative service provider without the consent of the building owner. Given that the Commission has absolutely no jurisdiction over these building owners use of their own property, the Commission should be cautious in reaching a

[6] *Chevron*, 467 U.S. at 842.

conclusion that usage of in-building conduit by a telecommunications provider amounts to some form of "ownership" or "control" sufficient to invoke section 224 of the Act.

Where CBT is unable to secure an arrangement with the building owner and/or the tenant for the use of these in-building facilities, CBT will only provide service to the MPOE, leaving the riser cable to be provided on an unregulated basis by either the building owner or the tenant (*i.e.,* the end user customer).

Finally, the Commission's attempt to apply Section 224 to in-building conduit is unsupported by the language of this section because basic differences exist between the assumptions underlying and the understanding of "ownership of" and "control over" conduits and rights-of–way included under Section 224 and the assumptions underlying and the understanding of in-building conduit as used by the Commission in this NPRM. The primary focus of section 224 is to insure that utilities that own or control conduits and rights-of way share the use of that space with competitive providers at rates that are just, reasonable and non-discriminatory.[7]

The basic premise of this section is that if the available space is insufficient to accommodate the request by a competing entity for new or additional space, the utility, because of its ownership and control of the space, can expand that space to accommodate the additional space requirements if the entity requesting space is willing to pay. For example, a utility could merely increase the height of a pole or bury an additional conduit within the existing rights-of-way. Such is not the case with in-building conduit, a difference that the Commission seems to ignore. With in-building conduit, it is not as simple as increasing the height of a pole or running an adjacent conduit.

[7] *See* 47 USC § 224 (A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.).

The situation with in-building conduit is fundamentally different. Often the method of creating an "access pathway" in a multi-tenant building does not involve the installation of conduit or ducts, per se, but rather involves drilling holes in floors or walls. These holes are called sleeves and permit cables and wires a manner of entrance and egress to spaces located on other floors or in other offices. Only the building owner controls the drilling of these "sleeves", which may, in a rare case, even affect the structural integrity of the building. In addition, space within buildings is much more finite, and is controlled by the owner of the building. Expanding the space available may require reduction of space in the building available for use for other purposes. Obviously the utility or ILEC does not have control of this arrangement. A utility or ILEC, or even this Commission, cannot force the building owner to provide more space. Unlike the situation envisioned by Section 224, the utility or ILEC does not have the ability through its ownership or control to provide more space. The owner of the building controls this space and any party requesting space must deal with the building owner.

Finally, one other factor which distinguishes the coverage of Section 224 from in-building conduit situations are the users of the space. Unlike the limitations placed in Section 224 on who may use utility rights-of-way, use of in-building facilities is subject to agreement with the building owner. Users who would not qualify to make use of space under the coverage of Section 224, such as alarm companies, Customer Premises Equipment providers (CPE), individual tenants of the building, computer companies, companies that provide local area networks, security companies or electrical contractors, who all provide services to the building, the owner and its tenants, could through agreement with the building owner make use of in-building conduit space.

III. Federal Regulation is not needed regarding in-building conduits or other riser facilities.

The marketplace, not federal regulation, should guide the issues involved in the usage of in-building conduit or other riser facilities. Even though the Commission seeks comment on whether building owners who allow access to their premises to any provider of the telecommunications services should make comparable access available to all such providers under nondiscriminatory rates terms, and conditions,[8] it is completely unclear from the NPRM where the Commission finds its authority to regulate the use of the private property of a building owner. While it may appear to be beneficial for CLECs or ILECs to support public-policy-based regulations requiring building owners to provide reasonable and non-discriminatory access to their building and riser facilities, such regulation would be short-sighted and would not withstand the legal challenges certain to occur. These legal challenges would focus not only on the Commission's jurisdiction and authority to regulate private building owners, but also would be based on the fact that the Commission by its regulations in this area would, in effect, be taking the property of the building owners in violation of the Fifth Amendment.[9]

Likewise, while the Commission may assert it has jurisdiction to mandate that carriers not enter into exclusive contracts for in-building conduit or riser facilities and

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[8] NPRM at ¶ 53.

[9] U.S. Const., Amendment V. Intangible interests can be "property" for the purposes of determining whether or not property has been taken without just compensation in violation of the Fifth Amendment. Smith v. Erie R. Co., 16 N.E.2d 310 (1938). Where such intangible interests are interfered with by a decision of the government, the party alleging a taking must show that a reasonable expectation of a guarantee of return on investment exists. See Duquesne Light Company v. Barasch, 488 U.S. 299, 307 (1989). In determining whether a "taking" forbidden by the Fifth Amendment has taken place, the United States Supreme Court has identified three factors which are of "particular significance": "(1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 224-25 (1985) (citing Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978)).

must share access, it should not do so.[10] The Act was intended to be deregulatory in nature. In keeping with the spirit of the Act, the Commission should not enact new additional regulations. There are already two competitive markets, real estate and telecommunications. The Commission should allow market forces to dictate the outcome concerning the use of limited spaces, including the in-building conduit and riser facilities, within privately owned buildings. Tenants and landlords will negotiate arrangements to allow the carrier of choice access to the tenant's premise or the CLEC or ILEC could negotiate separate agreements with the building owner if they choose to do so.

The Commission's reference that building owners are imposing unreasonable and discriminatory charges on ***competitive carriers*** indicates the Commission believes this situation is only faced by competitive carriers.[11] The Commission should note that building owners are seeking to raise their revenues from both CLECs and ILECs. CBT is facing demands from building owners that CBT clearly considers to be unreasonable. This is merely a condition that will be encountered in a competitive marketplace by both ILECs and CLECs alike. Carriers and tenants should be allowed to deal with these demands from building owners through negotiations, contracts and under existing state laws. The Commission should not intervene but rather should trust the participants in the market to determine a reasonable outcome.

IV. Building and Wiring cable should not become an unbundled element.

The U S Supreme Court in AT&T Corp. v. Iowa Utilities Board, 119 S. Ct. 721 (1999), found that the Commission did not give appropriate consideration to the "necessary and impair" standards of section 251(d)(2) of the Act in determining what

[10] If the Commission does mandate access and non-exclusive contract requirements, however, competitive neutrality requires the same rules and requirements to apply equally to ILECs and CLECs alike.

elements were to be unbundled. Based on this NPRM, it does not appear that the Commission has made any attempt to determine whether building and wiring cable meets the "necessary and impair" standards under section 251(d)(2) such that it should be considered an unbundled element under the Act.

In response to the Commission's April 16, 1999 Second Further Notice of Proposed Rulemaking in CC Docket No. 96-98, CBT indicated in its Comments "that regardless of the standards the Commission may ultimately set for determining if an element must be unbundled, the availability of the element outside the incumbent's network must be considered as an independent criteria."[12] This factor alone would disqualify building cable and wire from being considered an unbundled element.

Many alternate sources for building cable and wire are available for CLECs to utilize in this situation. The CLEC can self provision, sub-contract to a third party, or obtain building cable and wire from either the building owner or the tenant (end user) or from another vendor in the building, such as a CPE provider**.** In most cases, there will be three parties involved in the negotiations for space and access: the ILEC and/or CLEC, the building owner and the building tenant (end user). Within CBT's service area, since the riser cable is on the regulated side of the demarcation point, the CLEC can also obtain the riser cable as **part of** the local loop, which is already an unbundled element. [13]

V. Conclusion

There are many distinct differences between right-of-way and conduit included under Section 224 of the Act and in-building right-of-way and conduit utilized in multi-

[11] NPRM at ¶ 53.
[12] Comments of Cincinnati Bell Telephone Company CC Docket No. 96-98, filed May 26,1999 at page 5.

tenant buildings. Right-of-way and conduit within a multi-tenant building are "owned and controlled" by the building owner, not the telecommunications provider. Therefore Section 224 of the Act cannot be applied to right-of –way or conduit within a multi-tenant building. The building owner's permission is required for usage of in-building right-of-way and conduit. This permission is best obtained through negotiations between the tenant, the building owner and the telecommunications providers. The Commission should not intervene by instituting additional and burdensome federal regulations, but should trust the participants in these competitive markets (telecommunications and real estate) to arrive at acceptable solutions. Finally, no reasonable application of the necessary and impair standards under section 251(d)(2) of the Act could result in a requirement for building and riser cable to become an unbundled element.

Respectfully submitted,

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[13] This would also occur in areas of other ILECs, where, like CBT, the ILECs did not adopt the MPOE standard. This assumes, of course, that the local geographic market conditions support a finding that the local loop in these areas meets the standards for being considered an unbundled element.